



POLICE DEPARTMENT CITY OF NEW YORK

August 12, 2016

MEMORANDUM FOR: Police Commissioner

Re: Police Officer Brendan Grace
Tax Registry No. 952806
41 Precinct
Disciplinary Case Nos. 2014-12621

Charges and Specifications:

1. Said Police Officer Brendan Grace, assigned to the 41st Precinct, while on duty on October 15, 2013, at approximately 0106 hours, while in the vicinity of [REDACTED] New York County, did abuse his authority as a member of the New York City Police Department, in that he entered a dwelling without sufficient legal authority.

P.G. 203-10, Page 1, Paragraph 5 - Code 04 ABUSE OF AUTHORITY

Appearances:

For the Department: Amy Mervish, Esq. & Mary Lynne-Frey, Esq.
Department Advocate's Office
One Police Plaza
New York, New York 10038

For the Respondent: John Tynan, Esq.
Worth, Longworth & London, LLP
111 John Street – Suite 640
New York, New York 10038

Hearing Dates:

January 13 & March 10, 2016

Decision:

Not Guilty

Trial Commissioner:

ADCT Paul M. Gamble

REPORT AND RECOMMENDATION

The above-named member of the Department appeared before me on January 13 and March 10, 2016. Respondent, through his counsel, entered a plea of Not Guilty to the subject charge. The Department called Anavanissa Perez as a witness. Respondent called Police Officer Michael Levy as a witness and Respondent testified on his own behalf. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

After reviewing the evidence presented at the hearing, and assessing the credibility of the witnesses, I find Respondent Not Guilty of the charged misconduct.

FINDINGS AND ANALYSIS

Few things are more difficult, yet more fundamental to the role of a trier of fact, than attempting to reconstruct past events on the basis of opposing accounts. Factors such as corroboration, consistency, bias, logic and the degree to which an account comports with common sense and general human experience must be taken into account (*Maloney v. Suardy*, 202 A.D.2d 297, 609 N.Y.S.2d 179 [1st Dep't 1994]).

The following is a summary of the facts which are not in dispute. At approximately 0030 hours on October 15, 2013, Respondent Brendan Grace was conducting narcotics surveillance on the roof of 529 West 180th Street. 529 West 180th Street is a six-story building with a courtyard on the ground floor. At that time, Respondent was surveilling four individuals who were in the courtyard, one of whom was Person A. (T. 123). All of the individuals under surveillance were known to Respondent. There came a time when one of the individuals showed his phone to the others, after which the group fell silent and sat down. Person A walked from the courtyard into 529 West 180th Street (T. 124).

Respondent stepped back from the roof edge and approached the open door to the roof, behind which he stood. After waiting a few minutes, Respondent observed someone ascending the stairs to the roof, then slowly approaching the doorway to the roof with his fist raised. Respondent came around the door to confront the unknown individual and realized he was face to face with Person A. Both Respondent and Person A appeared startled, then both reached for the doorknob. Person A tried pulling the door closed as Respondent pulled on the door in the opposite direction. Respondent eventually pulled hard enough that he stumbled backwards and fell to the ground. Person A fled down the stairs at that point (T. 125-126).

Respondent got off the ground and called Police Officer Mike Levy using his mobile phone. When Levy answered the call, Respondent stated, "Person A, he's under" (T. 127). Respondent descended the stairs until he reached street level, then turned onto Audubon Avenue.

Levy received the aforementioned call from Respondent, and concomitantly observed that Person A walked quickly on Audubon Avenue in a southbound direction (T. 106-107). Levy followed Person A onto West 179th Street where he lived and lost sight of him (T. 107).

Respondent met Levy at the corner of Audubon Avenue and West 179th Street and proceeded to [REDACTED] Person A's building. Levy directed Respondent to Apartment [REDACTED], having become aware that Person A lived there when he had occasion to issue him a summons. Along the way, Respondent and Levy met up with Police Officers Mugno and Suri, who joined the pursuit (T. 128-129, 148-149).

At approximately 0100 hours, Respondent knocked on the door of Apartment [REDACTED] and announced himself as a police officer. After a period of time, the door was opened by Anavanisa Perez ("Perez"), a resident of that apartment for the past 34 years (T. 16). Perez lives with her

relative, Person A, in the apartment. When Perez opened the door, Respondent informed her that he was looking for Person A and wished to speak with him. Perez went back into the apartment, ostensibly to speak with Person A (T. 21, 131). When Perez returned to the front door, she had a further discussion with Respondent, after which he and the other officers entered her apartment, walked to the bathroom, and found Person A in the shower naked (T. 132-134). Respondent caused the other officers to place underwear on Person A and he was transported to the 34th Precinct for arrest processing (T. 134-135). At the precinct, Respondent listed misdemeanor charges of Criminal Trespass and Reckless Endangerment on the Online Booking Arrest Worksheet (T. 135).

Person A was eventually transported to Central Booking and was subsequently arraigned on felony charges of Burglary, Reckless Endangerment and Unlawful Imprisonment (T. 135).

What is in dispute in this case is whether Respondent entered Perez' apartment without sufficient legal authority. Based upon the credible, relevant evidence in the record, I find that he had sufficient lawful authority to enter the apartment on either of two exceptions to the warrant requirement: (1) consent or (2) hot pursuit.

Perez testified that she left the front door to speak with Person A, whom she found in the bathroom (T. 20). She told him that the police were at the front door and that they wanted to speak to him, then asked "What you did?" (Id.). Person A told Perez that he had done nothing and asked that she tell the police that he would come out after he finished (Id.). Perez testified further that Respondent placed his foot in the doorjamb to prevent it from closing before she went into her apartment to speak with Person A (T. 21). Perez testified further that she went back to the front door and told Respondent that Person A was in the bathroom and would

come shortly. According to Perez, Respondent then said, "Person A, if you don't come out, we're coming in." Perez told Respondent that he could not do so because he had no warrant; Respondent told her he could, pushed her aside and entered the apartment (T. 21).

Police Officer Michael Levy testified that when Respondent knocked on the door to Apartment [REDACTED] he asked Perez to speak with Person A. At first, Perez was unsure of whether Person A was home and went inside the apartment to check. Levy heard a loud voice using profanity, which he believed belong to Person A. When Perez returned to the front door, Respondent explained that he needed Person A to come outside. Perez responded, "You can check. He's inside" (T. 92, 113-114, 116, 117).

Respondent testified that after Perez opened the front door, he informed her that he wished to speak with Person A and she replied, "Okay, I'll go talk to him" (T. 131, 153). After Perez left them at the front door, they heard a male inside the apartment speaking in a loud voice, saying "No, mom. Fuck them; fuck the cops" (Id.). When Perez returned to the front door, she said, "Person A isn't home." Respondent testified that he told Perez, "Mrs. Perez, I just heard you arguing with him; I heard him yell." Perez said, "He's not home." Perez then said, "He's not here; you can come in and check," while opening the door and gesturing with her arm to come in (T. 132).

1. Hot Pursuit

Subject to certain limited exceptions, a warrantless search of an individual's home is *per se* unreasonable and hence unconstitutional (*People v. Sanders*, 26 N.Y.3d 773 [2016]; *Coolidge v. New Hampshire*, 403 U.S. 443, 454-455 [1971]). It is also well established that a suspect may not be arrested in his home without a warrant unless exigent circumstances exist (*Payton v. New York*, 445 U.S. 573, 587-588 [1979]). The *Payton* rule, however, does not affect the principle

that a fleeing suspect may not defeat an arrest which has been set in motion in a public place by retreating into a private place (*United States v. Santana*, 527 U.S. 38, 42-43 [1976]; *People v. Watson*, 115 A.D.3d 687, 688 [2d Dept. 2014]; *People v. Wheatley*, 55 A.D. 3d 947, 948 [3d Dept. 2011]; *People v. Lucas*, 290 A.D.2d 304, 305 [1st Dept. 2002]). “‘Hot pursuit’ means some sort of a chase but need not be an extended hue and cry ‘in and about the public streets’” (*United States v. Santana*, 527 U.S. at 43).

In this case, crediting Respondent’s testimony that Person A entered 529 West 180th Street, a dwelling in which he did not live, and ascended to the roof apparently ready to use force against someone, as evidenced by his raised fist, such conduct constituted Burglary in the Second Degree (P.L. § 140.20), a class “C” felony, carrying a maximum penalty of 15 years in state prison¹. At the very least, Person A’s attempt to lock a uniformed police officer on the roof of a building constituted the Class “A” misdemeanor of Unlawful Imprisonment in the Second Degree (P.L. § 135.05). Accordingly, the crime for which Respondent sought to arrest Person A was of sufficient gravity to warrant the doctrine of “hot pursuit” (*see Illinois v. McArthur*, 531 U.S. 326, 336 [2001])[misdemeanor offenses carrying punishment of up to one year in jail sufficiently serious for hot pursuit to be applicable]; *compare Welsh v. Wisconsin*, 466 U.S. 740, 753 [1984][hot pursuit not justified for minor offenses]).

Respondent testified that after he struggled with Person A on the roof of 546 W. 180th Street, he contacted Levy and stated, “Person A: he’s under,” signifying that he was to be arrested (T. 89). Levy observed Person A walking on Audubon Avenue quickly but chose not to pursue at that moment (T. 106-107). The tribunal takes judicial notice that Google Maps estimates the time to transit the distance from [REDACTED] to [REDACTED] on foot

¹ A person is guilty of Burglary in the Second Degree when he enters or remains unlawfully in a building with the intent to commit a crime therein and the building is a dwelling (Penal Law § 140.25(2)).

is two minutes. Levy testified that he followed Person A until he lost sight of him (T. 107). Levy waited for Respondent for one to three minutes before they met, then proceeded directly to Person A's residence, Apartment [REDACTED] (T. 109, 111-112). After Respondent knocked at the apartment door and had a conversation with Perez, he and Levy heard Person A's voice, confirming their belief that he was inside the apartment.

The continuous pursuit of Person A, initiated by Respondent's call to Levy, culminating in their entry into his apartment, was a true hot pursuit (*People v. Watson*, 115 A.D.3d 687, 688). The approximately 5-10 minute delay in apprehending Person A, as well as the brief period when Respondent and Levy lost sight of him, was reasonable under the circumstances and did not obviate the hot pursuit exception (*see People v. Glia*, 226 AD2d 66, 71 [1st Dept. 1996][two-hour delay in gaining entry into premises did not lessen the exigency created when suspect escaped into his home]; *see also Disciplinary Case 2015-13709* [signed June 24, 2016][Respondent found not guilty of unauthorized entry after he was directed to apprehend a suspect who retreated into his garage some 30 minutes after he was initially observed driving recklessly on a motorcycle with a passenger who was not wearing a helmet; entry authorized as hot pursuit]).

Even if the hot pursuit exception does not apply in this case, the entry would still be valid because Respondent obtained consent from Perez.

2. *Consent*

Based upon the credible evidence in the record, I find that Perez consented to Respondent's entry into her apartment.

I credit the testimony of Respondent and Levy on the issue of Perez' consent to enter. I considered the specifics of their testimony in addition to their respective demeanors on the witness stand and find both of these junior police officers to have testified truthfully.

Levy testified that Perez said "You can check; he's inside" (T. 92, 100, 113-114, 117, 118). Respondent testified that after Perez left them at the front door, they heard a male inside the apartment speaking in a loud voice, saying "No, mom. Fuck them; fuck the cops" (T. 131). When Perez returned to the front door, she said, "Person A isn't home." Respondent testified that he told Perez, "Mrs. Perez, I just heard you arguing with him; I heard him yell." Perez said, "He's not home." Perez then said, "He's not here; you can come in and check," while opening the door and gesturing with her arm to come in (T. 132).

Based upon the respective testimonies of Respondent and Levy corroborating each other, as well as the facial plausibility of each officer's recitation of the disputed facts, I find that their entry was pursuant to Perez' consent.

In contrast, Perez testified that when she left the front door to speak with Person A, she found him in the bathroom of her apartment (T. 20). Perez told him that the police were at the front door and that they wanted to speak to him, then asked "What you did?" (Id.). Person A told Perez that he had done nothing and asked that she tell the police that he would come out after he finished (Id.). Perez testified further that she went back to the front door and told Respondent that Person A was in the bathroom and would come shortly. According to Perez, Respondent then said, "Person A, if you don't come out, we're coming in." Perez told Respondent that he could not do so because he had no warrant; Respondent told her he could, pushed her aside and entered the apartment (T. 20-21).

I do not credit Perez' testimony that she demanded to see a search warrant and was pushed aside by Respondent as he entered her home. Perez is a 59-year old working person who appeared to the tribunal to be an otherwise responsible, law abiding citizen. Based upon her description of the conversation she had with her relative, I find that her question to Person A, "what you did?" evinces a consciousness of his blemished character. I find that her undeniable affection for her relative led her to attempt to initially mislead the police on October 15, 2015 and further biased her testimony before the tribunal in such a manner as to be less than candid about the circumstances of Respondent's entry into her apartment. Based upon the foregoing, I find Perez to be an unreliable witness due to bias. Thus, Respondent had lawful authority to effect Person A's arrest.

For all of the foregoing reasons, I find Respondent Not Guilty.

Respectfully submitted,



Paul M. Gamble

Assistant Deputy Commissioner Trials

APPROVED

OCT 04 2016

JAMES P. O'NEILL
POLICE COMMISSIONER